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CITATIONS

854237—49

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 46) is reported at 80 F. Supp. 158. The opinion of the United States Court of Appeals for the Second Circuit (R. 62) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1949 (R. 72). The petition for a writ of certiorari was filed on August 16, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the standard form Government bill of lading permits payment to an ocean carrier of freight to destination on Government cargo which is lost and never delivered.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The statute prohibiting advance payments, R. S. 3648, 31 U. S. C. 529, provides in pertinent part as follows:

> No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

The standard form Government bill of lading (Form No. 1058, approved August 24, 1928; 8 Comp. Gen. 698) (Ex. 11, R. 28a–29a) and the usual commercial ocean bill of lading are printed in pertinent part, *infra*, pp. 5–9.

STATEMENT

This action was brought by petitioner against the United States for the recovery, under the Tucker Act, 28 U. S. C. 1346, of $3,520.52 which the Comptroller General had collected from it by offset and deduction from other monies concededly due petitioner. The facts giving rise to the claim

of the United States to collect $3,520.52 from petitioner by deduction are undisputed.

On or before June 13, 1942, the War Department shipped a Government cargo of lumber, under the standard form Government bill of lading, from Mobile, Alabama, to Port of Spain, Trinidad, on petitioner's SS *Gunvor* (Fng. 10, R. 39). On June 14, 1942, with the Government cargo aboard, the *Gunvor* was lost at sea by enemy action before reaching its destination (Fng. 13, R. 44). A claim for payment of freight on the lost Government cargo, in the amount of $3,520.52, was subsequently presented by petitioner on the prescribed Government freight voucher (Ex. B, R. 33a), and payment was made by the War Department on or about September 15, 1942 (Fng. 14, R. 44). Upon audit of the account, the Comptroller General took exception to the payment on the ground that the freight had not been earned, and on July 24, 1944, petitioner was advised that a deduction would be made from an amount otherwise due unless the overpayment was refunded within sixty days (Fng. 15, R. 44; Ex. 8, R. 21a–22a). On February 2, 1946, refund not having been made by petitioner, collection was effected by deduction (Fng. 16, R. 45).

The District Court for the Southern District of New York concluded from these facts that petitioner, under the terms of the Government bill of lading, had earned the freight and that the sum of $3,520.52 was improperly deducted by the

Comptroller General (R. 46–55). On appeal, the Court of Appeals for the Second Circuit (one judge dissenting) reversed, holding that the standard form Government bill of lading "asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get" (R. 66).

ARGUMENT

1. It is well settled that, absent a valid agreement to the contrary, a carrier does not earn and may not claim payment of freight unless and until it completely performs its contract by delivering the goods to the proper person at the place of destination. See *Caze & Richaud* v. *Baltimore Ins. Co.*, 7 Cranch 358, 361; *The Tornado*, 108 U. S. 342, 347; Angell, *Carriers*, § 399 (5th ed. 1877); Carver, *Carriage of Goods by Sea*, §§ 543, 547 (8th ed. 1938); Poor, *Charter Parties and Ocean Bills of Lading*, § 108 (3d ed. 1948); Scrutton, *Charter Parties*, Art. 139 (15th ed. 1948); Robinson, *Admiralty*, § 82 (1939).[1] Although this general rule may be varied by express agreement, "such a stipulation should be expressed in terms so clear and unambiguous as to leave no doubt that such was the intention in framing the contract of affreightment."

[1] "Nor," as the court below observes, "is this result unjust to, or hard upon, the petitioner. The law throws upon all carriers the risk of performance, for performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon payment in any contract of service." (R. 66).

Angell, *op. cit. supra,* § 399, note (a); see also *Christie* v. *Davis Coal & Coke Co.,* 95 Fed. 837, 838–839 (S. D. N. Y.). We submit that petitioner has not demonstrated that the standard form Government bill of lading, which constitutes the basic contract of carriage herein, clearly and unambiguously departs from this long established rule. To the contrary, the Government bill of lading plainly provides for delivery of the cargo at destination before the carrier's right to freight attaches.[2] Cf. *Pope & Talbot, Inc.* v. *Guernsey-Westbrook Co.,* 159 F. 2d 139 (C. A. 9); *Toyo Kisen Kaisha* v. *W. R. Grace & Co.,* 53 F. 2d 740 (C. A. 9), certiorari denied, 273 U. S. 717.

It is petitioner's contention that Clause 6 of the usual commercial ocean bill of lading, which provides that "Full freight to destination * * * are due and payable * * * as soon as the Goods are received for purposes of transportation; and the same * * * shall be deemed fully earned and due and payable * * *. Goods or vessel lost or not lost, * * * and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid); * * *" (R. 43), is incorporated into the Government bill of

[2] In our view, R. S. 3648 (*supra,* p. 2), the statute prohibiting advance payments, compels this construction of the Government bill of lading. However, the court below found it unnecessary to pass upon the applicability of the statute (R. 67).

lading by Condition 2 of the Government bill, which directs that "Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." (R. 40).

But the provisions of the Government bill of lading do "otherwise state."[3] Condition 1 of the Government bill of lading declares that "Prepayment of charges shall in no case be demanded by carrier, * * *." (R. 39). As Judge Learned Hand points out in the opinion of the court below, even though the words just quoted stood alone, "it would be very unnatural to construe them as applying only to the time of payment of an absolute obligation. We can see no reason why the United States—which drew the bill—should wish to defer the payment of a claim

[3] Petitioner argues that the Government bill of lading does not "specifically" override the freight provision of the commercial bill of lading (Pet. 13–14). While we believe that the terms of the Government bill do specifically provide otherwise, it should be pointed out that petitioner misreads Condition 2. The condition is not "unless otherwise specifically provided hereon or otherwise specifically stated hereon" but (1) "unless otherwise specifically provided [elsewhere]" or (2) "otherwise stated hereon." In any event, as already noted, the burden is not upon the Government to show that the standard Government form specifically overrides the commercial form but upon petitioner to show that the Government bill of lading, taken as a whole, clearly and unambiguously modifies the general rule that the carrier does not earn freight until it delivers the cargo at destination.

which it must inevitably pay at some time. It was not, like a private person, in need of any extension of its credit. Why, if the freight was earned upon mere delivery, should it be interested in postponing its collection?" (R. 65–66). But the words do not stand alone; the sentence goes on to say "nor shall collection be made from consignee." The carrier is thereby deprived of its lien for freight, a lien expressly provided for in the freight clause of the usual commercial ocean bill of lading (*supra*, p. 5). Clearly, the denial to the carrier of its lien for freight had nothing to do with the time of payment.

The remainder of Condition 1 bears out and strengthens this interpretation. Continuing, Condition 1 states "* * * On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated." (R. 40).

A "properly accomplished" bill is carefully defined in Instruction 2 of the Government bill of lading (R. 40) which provides in pertinent part that—

> * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evi-

> dence upon which settlement for the service will be made. * * *

The certification thus required of the consignee for the "proper accomplishment" of the bill of lading is entitled "Certificate of Delivery" (R. 42) and certifies that—

> I have this day received from (name of transportation company) at (actual point of delivery by carrier) the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof.

The prescribed Government form of freight voucher which must accompany the "properly accomplished" bill of lading when presented for payment provides (Ex. B, R. 33a):

> 6. Payment for transportation charge will be made only for the quantity of stores delivered at destination * * *.

The express language of these various provisions of the Government bill of lading plainly prohibit the application of Clause 6 of the commercial bill that full freight to destination is due upon receipt of the goods by the carrier. Unless the carrier receives surrender of the bill with the Certificate of Delivery "properly accomplished," it cannot present it to the paying officer with the voucher for payment as required by Condition 1. And there is no ambiguity as to what the parties meant by "properly accomplished"; the consignee is not authorized to surrender the bill of

lading without receiving the goods. Only a bill so receipted[4] is a "properly accomplished" bill of lading, the only kind on which the paying officer may pay freight—and then "only for the quantity of stores delivered at destination."[5] We submit, therefore, that, under the terms of the Government bill of lading, petitioner did not earn the freight in question and that the sum of $3,520.52 was properly deducted by the Comptroller General.[6]

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[4] Herein, the consignee's Certificate of Delivery was merely endorsed "S. S. 'Gunvor' has been lost due to enemy action" "For the Acting District Engineer [signature illegible] Superintendent, August 8, 1942" (Ex. 11; R. 28a).

[5] Instruction 6 of the Government bill of lading (R. 41) declares that "in case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. * * *"

[6] The reliance of petitioner (Pet. 21) and Judge Augustus N. Hand, dissenting below (R. 69–70), on the Comptroller General's decision of April 7, 1942, 21 Comp. Gen. 909, as evidence of a practice to pay unearned freight is misplaced. That decision expressly adhered to the general rule that "delivery of the cargo at the port of destination is a condition precedent to the right to freight" (p. 912) but held (p. 913) that since "the difficulty here is not that these particular shipments were not transported to destination but rather that due to conditions of war prevailing in the Philippine Islands and Guam, it is not possible to establish of record that said shipments were received by the consignee from the carrier at destination. In view of the known conditions in said islands, as commonly reported in public dispatches, any failure to transfer the goods to, or to take receipt from, the consignee upon the discharge of cargo at destination at any time since the early part of December 1941, reasonably may be assumed

2. It appears unlikely that this question will be of any continuing importance. The standard form Government bill of lading, and particularly the language here involved, is currently being extensively revised by the General Accounting Office and other interested Departments. In view of the correctness of the decision below, further review would seem unwarranted.

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to be due to the inability of the consignee to receive rather than to any failure of the carrier to deliver, and so would not defeat the right of the carrier to freight charges." The decision thus contemplates merely excusing the carrier from obtaining the certificate and not from carrying the goods to destination. Cf. *McClure* v. *United States*, 19 C. Cls. 173, 181.

Petitioner's roundabout reliance (Pet. 7) on Sections 16 and 17 of the Shipping Act of 1946 (46 U. S. C. 815–816)—prohibiting "any undue or unreasonable preference or advantage" to a particular shipper—is also obviously unfounded. That statute does not apply where the United States is the shipper, and the Maritime Commission has consistently so construed it. Cf. *United States* v. *Cooper Corp.*, 312 U. S. 600; 49 U. S. C. 3 (2) and 22 (comparable provisions of the Interstate Commerce Act).

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should, therefore, be denied.

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